86-163

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1986

CHARLES BRIGGINS,

Petitioner,

against

THE POLICE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

JOHN J. MAGUIRE
Counsel for Petitioner
LAW OFFICES OF RICHARD HARTMAN
252-00 Horace Harding Expressway
Little Neck, NY 11362
(718) 423-1800

51PP

Question Presented for Review.

Whether the statute here, New York State Public Officers Law §30(1)(e), is unconstitutional in its application to Petitioner because its mechanical operation has extinguished Petitioner's property interest without due process of law, where upon reversal of Petitioner's conviction of a felony upon grounds of being blameless of any wrongdoing, Petitioner was deprived of reinstatement to his position as a Police Officer in the City of New York, or of an evidentiary hearing on the question of his reinstatement.

List of Interested Parties.

Counsel of record for Charles Briggins certifies that the following parties have an interest in the outcome of this case.

1. The Police Department of the City of New York, represented by Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York, 100 Church Street, New York, New York 10007.

2. The City of New York, represented by Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York, 100 Church Street, New York, New York 10007.

3. Solicitor General
   Department of Justice
   Washington, D.C. 20530

4. Attorney General
   State of New York
   State Campus
   Albany, N.Y. 12207

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Reasons for Granting Writ of Certiorari:

The statute here, New York State Public Officers Law §30(1)(e), is unconstitutional in its application to Petitioner because its mechanical operation has extinguished Petitioner's property interest without due process of law, where upon reversal of Petitioner's conviction of a felony upon grounds of being blameless of any wrongdoing, Petitioner was deprived of reinstatment to his position as a Police Officer in the City of New York, or of an evidentiary hearing on the question of his reinstatement 12

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI.

Petitioner, Charles Briggins, prays for a writ of certiorari to review an order of the Court of Appeals of the State of New York, entered in these proceedings on May 6, 1986, which affirmed an Order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, entered in these proceedings on August 8, 1985, which reversed a Judgment of the Supreme Court of

the State of New York, New York County, entered in these proceedings on December 12, 1983, which granted a Petition, brought pursuant to New York State Civil Practice Law and Rules Article 78, to the extent of remanding the controversy to Respondents for a Departmental hearing on the question of Petitioner's reinstatement to the Police Department.

Opinions Below.

The Memorandum of the Court of Appeals and the dissenting opinion by the Hon. Stuart Hancock, Jr., Associate Justice of the Court of Appeals, which affirmed the Order by the Supreme Court, Appellate Division, First Judicial Department appears at pages A1 and following of the attached Appendix. The Decision has been officially reported at 67 N.Y.2d 965 (1986).

The Order and Decision of the Supreme Court of the State of New York, First Judicial Department, which reversed the Order of Supreme Court, New York County, appears at pages B1 and following of the attached Appendix. The Decision has been officially reported at 112 A.D.2d 827 (1st Dept. 1985).

The Order and Memorandum Decision of the Supreme Court of the State of New York, County of New York, dated December 12, 1983, which granted the Petition brought pursuant to New York State Civil Practice Law and Rules Article 78, to the extent of remanding the controversy to Respondents for a Department hearing on the question of Petitioner's reinstatement to the Police Department appears at pages C1 and following of the attached Appendix. The Decision has been officially reported at 122 Misc.2d 1026 (Sup.Ct., N.Y. Co., 1983).

Jurisdiction.

The final order of the Court of Appeals of the State of New York in this matter was entered on May 6, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). This Court has jurisdiction of the controversy because it involves a ". . . title, right privilege or immunity . . . specially set up or claimed under the Constitution, treaties, statutes of, or commission held or authority exercised under the United States." 28 U.S.C. §1257(3).

Statutory Provision Involved.

Section 30(1)(e) of the Public Officers Law of the State of New York provides:

> §30. Creation of vacancies
>
> 1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:
>
> * * *
>
> e. His conviction of a felony, or a crime involving a violation of his oath of office.

Statement of the Case.

A. The Incident and Petitioner's Arrest

On September 26, 1966, Petitioner was appointed a Police Officer in the New York City Police Department.

At a subsequent date, Petitioner was promoted to the rank of Detective.

In addition, at a subsequent date, Petitioner became additionally employed as a part-time clothing salesman. For reasons not really relevant to this case, Petitioner desired to keep his supplemental earnings as a part-time clothing salesman from his wife. In order to do so, Petitioner assumed an additional identity by adopting a name Garry Morris. He associated the name with the address of a cooperating friend.

To further assist the establishment of this second identity, Petitioner opened a checking account at the Long Island Trust Company under the name of Garry Morris. Petitioner also used this name to obtain a temporary motor vehicle operator's permit and to apply for a permanent driver's license.

On March 1, 1975, Petitioner went shopping in several stores located in the Shoppe Village shopping center at 511 Montauk Highway, West Babylon, New York. He purchased merchandise from three separate stores in the shopping center. Petitioner utilized three checks totalling $261.91, which he drew on the checking account at the Long Island Trust Company, in order to pay for the merchandise.

Apparently, one of the merchants became suspicious of Petitioner because, when he examined one of the checks, he thought that the blank on which it was made was a xerox copy of a check rather than an original. The merchant, it was later ascertained, was wrong in this suspicion.

The merchant contacted a security guard, who was an off-duty Suffolk County Police Officer, on his second job. The security guard approached Petitioner and demanded Petitioner surrender his purchases and submit to an investigation. Petitioner demurred and questioned the security guard's authority. A physical struggle resulted, after which Petitioner was arrested.

Upon his arrest, it was ascertained that Garry Morris was in fact Charles Briggins. In addition, the driver's permit and application for driver's license were also seized.

B. The Criminal Case against Petitioner

In due course, a 13 count indictment was filed against Petitioner. Among other things, Petitioner was indicted for assault, forgery of the checks given to the merchants under the signature of Garry Morris, larceny of the merchandise purchased with the checks, possession of four checks drawn to the order of Garry Morris and the two counts of criminal possession of a forged instrument, relating to the driver's permit and the application for the driver's license, for which Petitioner was ultimately convicted. In addition, Petitioner made a complaint against a second Suffolk County Police Officer for taking, without permission, $50.00 from Petitioner, for which the Suffolk County Police Officer was found guilty and disciplined. Petitioner also made a brutality complaint against the arresting officer from the Suffolk County Police Department, who, in turn, sued Petitioner for defamation of character. Petitioner also sued the County of Suffolk for damages.

The trial court dismissed the counts of the indictment relating to forgery of the checks. The trial jury found Peti-

tioner not guilty of all of the rest of the counts of the indictment, except the two counts of criminal possession of a forged instrument relating to the motor vehicle licensing.

Petitioner appealed his conviction to the Supreme Court, Appellate Division, Second Department which was affirmed by a divided Court. (See *People v. Briggins,* 67 AD2d 1004 [2d Dept., 1979]). The matter was appealed to this Court where Petitioner's conviction was unanimously reversed and the indictment dismissed. (See *People v. Briggins,* 50 N.Y.2d 302 [1980].)

In reversing the conviction, this Court held that Petitioner committed no crime in signing his name "Garry Morris" to the two documents. Petitioner did not simulate, alter, erase or obliterate another person's signature. Instead, Petitioner was held to have merely used an adopted name, as for example, Samuel Clemens used the name Mark Twain, or Mary Ann Evans used that of George Eliot. Moreover, Petitioner did nothing to cause anyone who relied on the instrument to believe that Garry Morris was anyone other than Petitioner. In short, the Court saw no falsehood or "mens rea," in Petitioner's actions, and reversed the conviction.

A concurring opinion held that the indictment should be dismissed because there was no proof of Petitioner having a fraudulous intent.

C. Petitioner's Attempt to Rejoin the Police Department

Contemporaneous with the indictment, Petitioner was served with Departmental Charges and Specifications relating to the incident. They read as follows:

1. Said Det. Briggins, off duty at about 1930 hours to 2100 hours, Saturday, March 1, 1975, at Shoppe Village, 511 Montauk Highway, West Babylon, New York, did knowingly and wrongfully utter three forged checks in the amounts of $80.90, $56.02 and $125.89 in said premises; appropriate sum of money in the amount of $262.81 for his own use.

Patrol Guide 104-1, page 2, para. 1, subd. C
Patrol Guide 104-1, page 2, para. 3--CONDUCT

2. Said Det. Briggins, at time, date and location indicated did knowingly and wrongfully falsely identify himself as one Garry Morris.

Patrol Guide 104-1, page 2, para. 1—PUBLIC CONTACT
Patrol Guide 104-1, page 2, para. 3—CONDUCT.

At Petitioner's conviction of the two felonies, by operation of law, specifically Public Officers Law §30(e), he was terminated from the New York City Police Department. Because of this termination, the above mentioned Charges and Specifications became moot and were filed by the Department.

Upon the reversal of the conviction, Petitioner sought reinstatement to the Police Department, by means of making an application. On September 29, 1980, Petitioner's contentions with respect to his application for reinstatment were set forth to the Police Department's Chief Hearing Officer, Arnold N. Kriss. The Hearing Officer rendered a Report and Recommendation on December 11, 1980. In this report, while the Hearing Officer admitted

that if Petitioner were to be tried administratively, the Charges and Specifications would have to have been dismissed as being legally insufficient unless new subject matter were amended into the charges.

The Hearing Officer, however, stated that the Police Department was in possession of information that Petitioner was in possession of several unendorsed checks which had been reported missing from a burglary within a precinct in which Petitioner had been stationed. Although Petitioner had never been accused of any impropriety in connection with the checks, the Hearing Officer utilized the situation to recommend to the Police Commissioner that Petitioner not be reinstated to the Police Department, that he not be afforded a trial on the Departmental Charges and Specifications and that he not even receive a "name clearing" hearing with regard to this matter.

On July 16, 1981, the Police Commissioner approved the recommendation in its entirety. Petitioner instituted the present Article 78 petition seeking reinstatement to the Police Department or a hearing in the alternative. The Article 78 petition was duly opposed.

D. The Decisions in Supreme Court, New York County

The first line of defense by the City of New York to the petition was to make a motion to dismiss the petition on the grounds that 1) the claim was time barred, and 2) the provisions of the Public Officers Law, as a matter of law, precluded a police officer's reinstatement to the Department even upon reversal of a conviction.

Supreme Court at Special Term denied the motion to dismiss the petition and directed that an answer be filed to

the petition. (See *Briggins v. McGuire,* 114 Misc.2d 687 [Sup.Ct., N.Y. Co., 1982].) The Court held that, because any attempt by a convicted police officer to be reinstated prior to a reversal of a conviction would have been futile, the time limitation only began to run "after the determination to be reviewed has become final and binding" (citing CPLR §7801).

The Court also refused to hold that Public Officers Law §30 mandated preclusion, as a matter of law, of a police officer's reinstatement to the Department upon reversal of a criminal conviction (citing *Greene v. McGuire* in the United States District Court at 517 F.Supp. 1330 [S.D.N.Y., 1981]).

The City of New York made a motion to reargue the Court's decision, especially the branch of the Court decision dealing with the operation of Public Officers Law §30 here. Upon reargument, the Court modified its original determination. It was held that a police officer who was convicted of a felony and was therefore automatically terminated pursuant to the Public Officers Law, had a property and liberty interest in his employment prioir to his dismissal. This interest meant that, upon a reversal of a criminal conviction on the grounds that no crime had in fact been committed, the police officer was entitled to a post termination reinstatement hearing. The Court, however, also held that a police officer in such a situation, was not entitled to automatic reinstatement by Court Order prior to the determination after the hearing. The Court's decision was supported by a lengthy discussion of *Greene v. McGuire,* which, between this decision and the previous decision, had been reversed by the Court of Appeals, Second Circuit. (See 683 F.2d 32 [2d Cir., 1982].) In sum, Supreme Court at Special Term held that the Second

Circuit had erred in its interpretation of New York law. (See *Briggins v. McGuire,* 118 Misc.2d 964 [Sup.Ct., N.Y. Co., 1983].)

The City of New York, as per the Court's direction, filed an answer to the Article 78 petition. Petitioner moved to restore the matter to the calendar and asked the Court for a determination on the merits.

The Court held that Petitioner was entitled to a Departmental hearing on the issue of reinstatement. (See *Briggins v. McGuire,* 122 Misc.2d 1026 [Sup.Ct., N.Y. Co., 1983].)

An appeal by the City of New York and the New York City Police Department ensued.

E. The Order of the Appellate Division

On appeal to the Appellate Division, Respondents argued that upon his conviction of a felony, and regardless of any subsequent reversal of that conviction, Petitioner's position as a Police Officer was automatically vacated by operation of the statute and that therefore, his right to a proprietary interest in that position had been extinguished. Therefore, Petitioner, according to Respondents, was not entitled to reinstatement nor to a disciplinary hearing.

Petitioner argued to the contrary. It was submitted in his brief that the fact that he was found to be factually innocent of wrongdoing by the Court of Appeals, as a matter of fact as well as a matter of law, precluded the mechanical operation of Public Officers §30(e). Moreover, it was urged that this Court's decision in *Toro v. Malcolm,* 44 N.Y.2d 146 (1978) was not controlling under the circumstances present, because of Petitioner's factual innocence. In addition, it was argued that the deci-

sion by the United States Court of Appeals, Second Department, *Greene v. McGuire,* 683 F.2d 32 (2nd Cir., 1982), reversing 517 F.Supp. 1330 (S.D.N.Y., 1981) was also distinguishable, or to the extent it was controlling, the case was incorrectly decided.

In a Memorandum Decision, the Supreme Court, Appellate Division reversed the Order of Supreme Court, New York County, largely for the reasons stated by Respondents. Petitioner duly appealed to the Court of Appeals of the State of New York.

In that Court, the majority upheld the constitutionality of the statute. The Court held that the operation of the statute must be interpreted as being in harmony with constitutional principles and that it was in conformance with the plain meaning of the words which made it up.

The Court noted that the statute had been enacted and maintained in substantially the same form for nearly 100 years. In addition, the Court stated that since the decision in *Toro v. Malcolm, supra,* the Legislature of the State of New York had ample opportunity to amend the statute in order to carve out a statutory exception in cases of wrongful conviction of civil servants and public officers, but had not done so, a circumstance that the majority of the Court found significant.

The dissenters in the Court of Appeals of the State of New York disagreed. They believed that, as Petitioner was granted a property interest in his position by New York State law, he was entitled to a reinstatement hearing under the due process guarantee contained in the United States Constitution, especially under the circumstance where it

had been determined that he had been convicted of conduct which was not a crime.

The dissenting opinion stated that the interpretation of the statute as made in the majority opinion was incorrect because the "crucial event," the conviction of a felony, had not happened. Because Petitioner's conduct, which was under scrutiny, not only was not a felony, but was not even criminal, the interpretation of the majority constituted a misreading of the original intention of the Legislature.

The dissent believed it to be "fundamentally unfair that a tenured Civil Service office holder should be totally divested of all rights in his position for conduct which was not criminal." *Briggins v. McGuire,* 67 N.Y.2d at 972.

Petitioner now moves this Court for the granting of his Petition for a Writ of Certiorari.

REASONS FOR GRANTING WRIT OF CERTIORARI.

The statute here, New York State Public Officers Law §30(1)(e), is unconstitutional in its application to Petitioner because its mechanical operation has extinguished Petitioner's property interest without due process of law, where upon reversal of Petitioner's conviction of a felony upon grounds of being blameless of any wrongdoing, Petitioner was deprived of reinstatement to his position as a Police Officer in the City of New York, or of an evidentiary hearing on the question of his reinstatement.

It is submitted that the United States Constitution requires that the Order of the Court of Appeals of the State of New York should be reversed, and this controversy

remanded to the Courts of the State of New York for further proceedings, with a view to granting Petitioner either reinstatement to his former Civil Service position of Police Officer, or in the alternative, granting him an evidentiary hearing on the question of his reinstatement. It is further submitted that the majority of the Court of Appeals erred in affirming the Order of the Supreme Court, Appellate Division of the State of New York.

The key question, overlooked by the majority of the Court below was whether Petitioner, possessing Civil Service tenure, had a property interest in his position. See *Economico v. Village of Pelham,* 50 N.Y.2d 120 (1980).

Under the circumstances present, it is clear that Petitioner did have a property interest in his position. According to New York law, Petitioner, as a tenured civil servant, has a recognized and protected "property interest" in his continued employment and in all the rights and privileges appertaining thereto. See New York State Civil Service Law §75. This "property interest" may not be extinguished by a governmental agency employing the civil servant, unless the agency provides the civil servant with notice for the reasons for its extinguishment and an opportunity to present his case. In short, the civil servant is entitled to due process requirements. *Economico v. Village of Pelham, supra; Board of Regents v. Roth,* 408 U.S. 564 (1972); *Perry v. Sindermann,* 408 U.S. 725 (1972).

According to the statute in question here, and as relevant, Public Officers Law §30(1)(e), a civil servant's position is automatically vacated upon his conviction of a felony. Petitioner was convicted of certain felonies. However, the New York State Court of Appeals reversed his conviction for those felonies, specifically finding that

Petitioner, by his conduct, had committed no crime. Because Petitioner had not committed a crime, and his conviction had been set aside on this basis, he was entitled to be placed in the same situation that he was in prior to his erroneous conviction. See *People v. Nitzberg,* 289 N.Y. 523 (1943).

The application by the Courts of the State of New York of Public Officers Law §30(1)(e) in a mechanical manner and with absolute effect, even though Petitioner had not been convicted of a felony, was wrong and violative of Petitioner's due process rights. For this reason, Petitioner asks the Court to intercede on his behalf, grant the present petition and ultimately reverse the orders of the Courts of the State of New York.

It is submitted that two previous cases have caused great misfortune to those civil servants whose criminal convictions had been reversed on grounds of factual innocence. It is submitted that where, as in the case of the Petitioner, a criminal conviction was obtained and later set aside, federal constitutional law, as well as New York law, must be construed to restore the affected civil servant to the position he held prior to his illegal conviction.

Unfortunately for Petitioner, the two previous cases, *Toro v. Malcolm,* 44 N.Y.2d 146 (1978) and *Greene v. McGuire,* 683 F.2d 32 (2nd Cir. 1982), reversing 517 F.Supp. 1330 (S.D.N.Y., 1978), which the New York Courts have found controlling, each involved civil servants whose criminal convictions were reversed on legal technicalities, rather than on the facts presented. Because of these circumstances, the civil servants involved being of less than clean hands, the two Courts were reluctant to permit their reinstatement.

By contrast, the case at bar involved a guiltless person, wrongfully convicted. The New York Court of Appeals reversed Petitioner's conviction after an analysis of the facts presented. Pursuant to New York State Criminal Procedure Law §470.20, the accusatory instrument against Petitioner was dismissed on that review. No "legal technicality" or "legal fiction" was employed to declare Petitioner innocent of wrongdoing here.

Therefore, by operation of New York law, a reversal of a criminal conviction places a defendant in the same position he was prior to his conviction. See New York State Criminal Procedure Law §§ 470.20 and 470.55. Petitioner, as a civil servant, stands entitled to the benefits and protections of these statutes.

The two cases cited, *Toro* and *Greene,* are inapposite to the present controversy. The Supreme Court, New York County recognized, in its opinion (118 Misc.2d 964), that *Toro* was distinguishable from the present fact pattern. *Toro* involved a correction officer who was convicted of a felony. His office was vacated pursuant to §30(i)(e) upon conviction. Subsequently, his conviction was reversed on a legal technicality in no way indicative of his innocence. Nevertheless, the Department of Correction voluntarily reinstated the officer. He then commenced an action to recover back pay. The sole issue in *Toro* was whether the voluntarily reinstated officer was entitled to back pay for the period between his conviction and his reinstatement.

With respect to the issue presented by the present case, in *Toro,* the Court of Appeals stated *in dicta* that it was opposed to a general rule that would entitle a civil servant whose conviction is reversed, regardless of the ground for reversal, to automatic reinstatement with back pay.

The Court of Appeals, *in dictum,* indicated sympathy to the plight of a truly innocent civil servant, unjustly accused and convicted, but declined, under the fact present in *Toro* to establish a general rule of relief to "provide unjustified relief to others not equally deserving." *Toro* at 151.

Petitioner argued to the Court of Appeals that *Toro* appeared to leave open a possibility to afford relief to those who were deserving to reinstatement, on a case-by-case basis, and attempted to convince the Court that Petitioner was worthy of such consideration. The majority of the Court of Appeals declined to follow Petitioner's argument, stating that:

> In fashioning this broad rule, we expressed sympathy with the 'plight of a truly innocent officer unjustly accused and convicted,' but nonetheless interpreted the statute in conformance with its plain meaning in the manner most suitable to effectuating the Legislature's intent [*Toro* at 150].

The dissenters disagreed with this interpretation, and it is suggested that this view was the more correct one.

The decision of the Court of Appeals, Second Circuit, in *Greene v. McGuire, supra,* does not compel the Court to find that a police officer whose felony conviction was reversed on the grounds that no crime had in fact been committed is not entitled to an otherwise statutorily required hearing. In the decision by Supreme Court, New York County, reported at 118 Misc.2d 964, the Court below stated that there was justification to believe that the Court of Appeals, Second Circuit, impermissibly extended *Toro v. Malcolm, supra,* in an erroneous manner. The

Court below held that sitting as Supreme Court, Special Term, it, as a State Court, was not compelled to follow an incorrect interpretation of State law by a Federal Court.

Whether or not the Supreme Court, New York County was correct that the Court of Appeals, Second Circuit, incorrectly decided *Greene* is in the considered opinion of Petitioner not germane to this controversy. It is urged by Petitioner that the facts in *Greene* are sufficiently different from those in the present case, as to render the result in *Greene* to be distinguishable from the present case.

In *Greene,* two police officers were convicted of a felony based solely on the testimony of accomplices without corroboration. The convictions were reversed on a legal technicality, that their convictions could not stand without necessary corroborative evidence. At their request for reinstatement, the Police Department stated that not even a hearing was necessary because:

> . . . accomplice testimony would have been sufficient in a departmental hearing to justify their dismissal.

The Police Department in *Greene* contended that since there was no dispute as to the facts there was no need to hold a departmental hearing in accordance with due process requirements.

The Second Circuit, in reversing the District Court, agreed with the position of the New York City Police Department, relying upon Public Officers Law §30(1)(e), when read together with *Toro v. Malcolm, supra,* and *Bishop v. Wood,* 426 U.S. 341 (1976).

As already stated, Petitioner maintains that *Toro v. Malcolm* is not controlling in the instant action. Nor is *Bishop v. Wood, supra,* pertinent here. In *Bishop,* the discharged civil employee was not a permanent civil servant, and was not under the protection of the Civil Service Law, nor of any other similar statute. The discharged civil servant in *Bishop* simply had no property interest in his former position before he was discharged, and did not even have as much as an arguable claim.

Toro and *Greene* involved police officers whose convictions were reversed on legal technicalities, in no way indicative of their innocence. The evidence against the officers involved would have been sufficient to warrant their dismissal after a departmental hearing, because of the fact that, in each case, the civil servant was guilty of some degree of moral turpitude, if not actual criminal activity. Furthermore, there were no facts in dispute in any of those cases. The instant action, by contrast, involves a permanently appointed police officer who was wrongfully accused and convicted.

In sum, it was fundamentally unfair that Petitioner, under the present circumstances, was not afforded his due process rights to his Civil Service position as a New York City Police Officer. The statute in question, as construed by the Courts of the State of New York, has denied Petitioner constitutional rights by depriving him of a property interest in his Civil Service position without an opportunity to prove "the legitimacy of his claim." *Briggins v. McGuire,* dissenting opinion at p. 972, citing *Perry v. Sindermann, supra,* at p. 603.

Conclusion.

For the reasons stated above, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

JOHN J. MAGUIRE
Counsel for Petitioner
Law Offices of Richard Hartman
252-00 Horace Harding Expressway
Little Neck, NY 11362
(718) 423-1800

Certificate.

JOHN J. MAGUIRE hereby certifies that he is a member of the bar of the Supreme Court of the United States and states that three copies of the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York were mailed postpaid first class mail to each of the following:

Frederick A. O. Schwarz, Jr.,
Corporation Counsel of the City of New York,
100 Church Street, New York, N.Y. 10007

Solicitor General of the United States
Department of Justice,
Washington, D. C. 20530

Attorney General of the State of New York
State Campus
Albany, New York 12207

by depositing same in a United States Post Office at 90 Church Street, New York, N.Y. 10007 with first class postage prepaid and that forty copies were deposited in a United States Post Office at 90 Church Street, New York, N.Y. 10007 with first class postage prepaid and properly addressed to The Clerk of the Supreme Court of the United States, Supreme Court Building, One First Street, N.E. Washington, D. C. 20543.

JOHN J. MAGUIRE

Sworn to before me this
30th day of July, 1986
Roland W. Johnson
Notary Public, State of New York

No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1987

Appendix A—Memorandum Decision of the Court of Appeals of the State of New York.

COURT OF APPEALS

STATE OF NEW YORK.

IN THE MATTER

OF

CHARLES BRIGGINS,

Appellant,

v.

ROBERT MCGUIRE, as Police Commissioner of the Police Department of the City of New York, *et al.*,

Respondents.

(54), Raymond E. Kerno & Richard Hartman, Little Neck, for appellant.

Frederick A.O. Schwarz, NYC Corporation Counsel (Edward F.X. Hart & Larry Sonnenshein of counsel) for respondent.

MEMORANDUM

The order of the Appellate Division should be affirmed, with costs.

Constitutionally protected property rights in a public office "are created and their dimensions defined" by, among other things, state law (*Board of Regents v. Roth,* 408 US 577; *Greene v. McGuire,* 683 F2d 32, 34). While this State's Civil Service Law certainly creates a protected property interest in a police officer's position, Public Officers Law § 30(1)(e) mandates that a public office automatically becomes vacant upon an officer's "conviction of a felony". This provision was enacted substantially in its present form nearly 100 years ago (L 1892, c 681), and we held early on that its "application * * * is not defeated by the possibility that the judgment [of conviction] may be reversed" (*Matter of Obergfell,* 239 NY 48, 50).

Upon a more recent examination of the statute in light of a dismissed correction officer's application for back pay following an appellate reversal of his felony conviction, we noted that "[t]he directive contained in section 30 of the Public Officers Law is clear and unqualified: every public office becomes *vacant* upon the officer's conviction of a felony. A conviction of the incumbent constitutes an abridgement of the office, automatically terminating its duration. (*Matter of Obergfell,* 239 NY 48, 50 [*supra*]; *Matter of Breslin v. Leary,* 35 AD2d 794, 795; see, generally, McQuillin, Municipal Corporations, pp 432-433.)" (*Matter of Toro v. Malcolm,* 44 NY2d 146, 149-150 [emphasis in original]). We attributed the statute's absolute effect to "a legislative decision borne out of the recognition that a public officer's conviction of a felony does not permit cessation of governmental functions for

the period required to exhaust the appellate process. Continued performance of governmental functions necessitates the existence of a point in time at which the affected office may be filled without concern for the possibility that at some future date a former officer's conviction may be reversed" (*id.* at p 150). In fashioning this broad rule, we expressed sympathy with the "plight of a truly innocent officer unjustly accused and convicted", but nonetheless interpreted the statute in conformance with its plain meaning in the manner most suitable to effectuating the Legislature's intent (*id.*).

Since the decision in *Toro,* the Legislature has not seen fit to alter the law in this area as formulated by the courts or to carve out a statutory exception in cases where a public officer has been wrongfully convicted. We cannot agree with our dissenting colleague that this is a different case in any meaningful sense. Petitioner was "convicted of a felony." At that point his position was terminated and under state law he no longer had a protectable property interest in the office that would mandate a reinstatement hearing (*Greene v. McGuire,* 683 F2d 32, *supra*).

HANCOCK, JR., J. (dissenting):

In our view, New York law and the Federal Constitution require that the Appellate Division order be reversed. We agree with Special Term that petitioner Briggins has a constitutional right to a departmental reinstatement hearing.

The question, we emphasize, is not whether Briggins' position with the New York City Police Department became vacant under the Public Officers Law upon his conviction of what was then assumed to be a crime. The question is whether Briggins, a detective with Civil Service tenure (*see, Economico v. Vil. of Pelham* [50 NY2d 120, 125, 126]), had a property interest in his position—as

determined by New York law—which entitled him to a reinstatement hearing under the due process guarantee of the Federal Constitution, when it was determined that he had been convicted of conduct which was *not a crime* (*see, Bishop v. Wood,* 426 U.S. 341, *Perry v. Sindermann,* 408 U.S. 593; *Bd. of Regents v. Roth,* 408 U.S. 564; *Economico v. Vil. of Pelham, supra,* at pp 125, 127). We conclude that he had such an interest.

In 1975 a jury found Briggins guilty of two counts of criminal possession of a forged instrument in the second degree. He had obtained a temporary motor vehicle operator's permit and a license application and signed them with a pseudonym—presumably adopted to conceal from his wife the earnings he derived from a part-time job. As a result of the conviction, Briggins' position became automatically vacant by operation of Public Officers Law §30(1)(e). On May 6, 1980, this Court unanimously held that the documents did not constitute forged instruments, that their possession was not a violation of the Penal Law, and that Briggins' actions were not criminal. Applying "the fundamental principle that a person cannot be found criminally liable for conduct which *does not constitute a crime*" (*People v. Briggins,* 50 NY2d 302, 309 [emphasis added]), we reversed the Appellate Division's order affirming Briggins' conviction and dismissed the indictment.

Following our decision, Briggins applied for reinstatement and, when the department refused, he commenced the instant CPLR article 78 proceeding. Special Term found that he was not entitled to automatic reinstatement but held that, as a matter of law, he was entitled to a departmental reinstatement hearing. The Appellate Division, citing *Greene v. McGuire* (683 F2d [2d Cir] 32), reversed and dismissed Briggins' petition. It held that "all rights to the office disappeared" at the time of the convic-

tion, and that denial "of a hearing in conjunction with petitioner's application for reinstatement deprived him of neither liberty nor property, thus negating any claims with regard to constitutional due process." The majority has adopted that decision.

Whether a particular public office creates a constitutionally protected property interest in the holder is, of course, a matter of state law (*see, Bd. of Regents v. Roth, supra,* at p 577; *Economico v. Vil. of Pelham, supra,* at p 125; *Matter of Petix v. Connelie,* 47 NY2d 457, 459). Under New York law, Briggins, a permanent appointee in the classified Civil Service, unquestionably had a protected property interest in his position (*see,* Civil Service Law §§58, 75; *Economico v. Vil. of Pelham, supra,* at p 125), albeit subject to Public Officers Law §30(1)(e)—i.e., to the offices becoming vacant if the incumbent should be *convicted of a felony (see, Economico v. Vil. of Pelham, supra,* at p 127).

Here, however, the Appellate Division has applied Public Officers Law §30(1)(e) with absolute effect even though the incumbent was not convicted of a felony. It has concluded that Briggins' property interest was totally extinguished as a result of his conviction for conduct which, we have specifically held, was *not a crime at all (People v. Briggins, supra,* at p 309), and that even his right to a reinstatement hearing has been lost. This construction is not permitted either by the plain wording of the statute or the dictates of common sense and fairness. Nor is such a harsh application of the statute necessary to further its purpose.

The Public Officers Law states in pertinent part:

> §30. *Creation of vacancies*
>
> 1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:
>
> e. His [the incumbent's] conviction of a *felony, or* a *crime* involving a violation of his oath of office; [emphasis added]

The language of the statute is unequivocal. "[U]pon an officeholder's conviction of a *felony,* that office becomes vacant by operation of law" (*Matter of Gunning v. Codd,* 49 NY2d 495, 500 [emphasis added]). Its purpose is equally free from doubt—not to punish the officeholder but to assure the public that its "officers are individuals of moral integrity in whom [it] may, without second thought, place [its] confidence and trust" (*Toro v. Malcolm,* 44 NY2d 146, 152). In giving effect to this plain meaning and undeniably important public purpose we have not hesitated to apply the statute literally.

Thus, we have held that the automatic vacatur of the position of an incumbent convicted of a felony will not be affected by a reversal on appeal because "one convicted of a *felony* shall not retain a post of honor" (*Matter of Obergfell,* 239 NY 48, 50 [emphasis added]). We have adhered to this literal application acknowledging that there could be cases where "an innocent officer is unjustly convicted" (*Matter of Toro v. Malcolm, supra,* at p 151). The justification for our refusal to make exceptions to the categorical rule of automatic vacatur on felony conviction lies not only in the statute's clear language and public import, but also in two practical considerations—the ad-

visability of avoiding a precedent which could "provide unjustified relief to others not equally deserving" (*Matter of Toro v. Malcolm, supra,* at p 151), and "the recognition that a public officer's conviction of a felony does not permit the cessation of governmental functions for the period required to exhaust the appellate process" (*id.*, at p 150).

This strict enforcement of the statute—i.e., that "[e]very office *shall be vacant upon the happening* [of the incumbent's] conviction of a felony" (Public Officers Law §30[1][e] [emphasis added])—presupposes, of course, the happening of the crucial event—the conviction of a felony. Here, that has not happened. To apply the statute to Briggins' position one must conclude that the Legislature intended the words "conviction of a felony" to include convictions for conduct which was not felonious or even criminal. Such an interpretation is contrary to the accepted rule that the intent of a statute should be determined from the language used and should be given its natural and obvious meaning (*see,* McKinney's Statutes §94).

Nor can the policy considerations compelling automatic vacatur apply where an incumbent has been convicted for noncriminal conduct. The Legislature could, with good reason, "strike the balance" in favor of the public's interest in having officers of unquestioned "moral integrity", and against the interest of an incumbent who has been found by a trier of the fact to have committed acts constituting a felony (*see, Matter of Toro v. Malcolm, supra,* at pp 151, 152)—even when the conviction is later reversed. For it is reasonable to suppose that an incumbent, whom a jury has branded as a felon, is probably unfit for office. There is no basis for this assumption when the incumbent has been found guilty of conduct that is not a crime.

Clearly, that position does not conflict with *Matter of Toro v. Malcolm, supra.* There, the petitioner had been voluntarily reinstated and the sole issue before us was his entitlement to back pay. Here, the issue is *not* back pay or the vacatur of a public office, but a reinstatement hearing—i.e., whether the New York Legislature could have intended that Public Officers Law §30(1)(e) should be applied to deny Briggins a property interest sufficient to warrant due process protection (*see, Bishop v. Wood,* 426 U.S. 341, *Perry v. Sindermann,* 408 U.S. 593; *Bd. of Regents v. Roth,* 408 U.S. 541; *Economico v. Vil. of Pelham,* 50 NY2d 120, 125, 127; *see also, Greene v. McGuire,* 683 F2d [2d Cir] 32, 35). Also, of course, unlike Briggins, Toro was found guilty of authentically felonious conduct—burglary, petit larceny and impersonating a police officer—and his convictions were reversed for reasons not necessarily indicative of innocence (*Matter of Toro v. Malcolm, supra,* at p 149).[1] For the same reason,

---

[1]Contrary to the majority's characterization of the holding in *Matter of Toro v. Malcolm,* this Court did not establish an inflexible rule precluding any relief for a public official whose conviction has been reversed, regardless of the circumstances. Rather, this Court simply refused "*to establish* a *general rule* which would provide *unjustified* relief" to undeserving officers (*Matter of Toro v. Malcolm, supra* at 151 [emphasis added]). Denying the specific relief requested under the facts of that case, the majority of the Court in *Toro* explained that "a general rule. . . that public officers whose convictions have been reversed be automatically reinstated to their former office *and awarded back pay,* would apply to all public officers whose convictions were reversed *regardless of the basis for the reversal* (*id.* [emphasis added]).

The position we urge is entirely consistent with that holding. We are, of course, not positing a "general rule", "regardless of the basis for the reversal", or that defendant is entitled to be "automatically reinstated" and "awarded back pay". We simply cannot agree that Public Officer's Law §30(1)(e) was ever intended to have the arbitrary effect which the majority holds is mandated in this case by *Matter of Toro v. Wilson.*

Greene v. McGuire, supra, involving convictions on various felony charges of bribery and conspiracy, is distinguishable.

In granting Briggins a reinstatement hearing we would not be holding that a hearing is required whenever an incumbent officeholder's felony conviction has been reversed on appeal as in *Matter of Toro v. Malcolm, supra* and *Greene v. McGuire, supra.* For, as explained, where the incumbent has been convicted of an actual felony, the Legislature could, for reasons of policy, have decided that there should be no remaining property interest in the position (*see, Economico v. Vil. of Pelham, supra,* at p 127). Absent a felony conviction, however, nothing in common experience or in the statutory purpose, and certainly nothing in the language of the statute itself, would justify that result.

The constitutional due process question presented depends upon this Court's delimitation of Briggins' property interest in his position under New York law—whether he had "a legitimate claim of entitlement to it" (*Bd. of Regents v. Roth,* 408 U.S. 564, 577) which he "may invoke at a hearing" (*Perry v. Sindermann,* 408 U.S. 593, 601). The essence of constitutional due process, we have held, "is fundamental fairness" (*Economico v. Vil. of Pelham, supra,* at p 125), and it may not be assumed that the Legislature ignored this basic concept in defining the property interest in circumstances such as Briggins' (*see, United States v. Jin Fuey Moy,* 241 U.S. 394, 401; *Dollar Co. v. Canadian Car & Foundry Co.,* 220 NY 270, 275-278; *see generally,* McKinney's Statutes §§143, 146, 150 to the effect that a statutory construction which is unreasonable, or works a hardship, or is unconstitutional should be avoided). It is fundamentally unfair that a tenured Civil Service officeholder should be

totally divested of all rights in his position for conduct which was not criminal. To assume that the Legislature intended that Public Officers Law §30(1)(e) should be given such uncalled-for effect would conflict with basic rules of statutory construction (*see*, McKinney's Statutes §§143, 146, 150) and with the plain language of the statute. If the Legislature did not so intend, then Briggins' residual interest in his position was sufficient to trigger the due process requirement of an opportunity to prove "the legitimacy of his claim" (*Perry v. Sindermann, supra*, at p 603).

Order affirmed, with costs, in a memorandum. Chief Judge Wachtler and Judges Simons, Kaye, Alexander and Titone concur. Judge Hancock dissents and votes to reverse in an opinion in which Judge Meyer concurs.

Decided May 6, 1986

APPENDIX B—Order and Decision of the Supreme Court, Appellate Division, First Judicial Department.

Order of Reversal.

At a term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department in the County of New York, on August 8, 1985.

Present:
Hon. Theodore R. Kupferman,
Justice Presiding;
David Ross
Sidney H. Asch
Arnold L. Fein,
Justices.

IN THE MATTER OF THE APPLICATION
OF
CHARLES BRIGGINS,

Petitioner-Respondent,

For a Judgment Pursuant to Article 78 of the CPLR,

against

ROBERT MCGUIRE, as Police Commissioner of the Police Department of the City of New York, NEW YORK CITY POLICE DEPARTMENT and THE CITY OF NEW YORK,

Respondents-Appellants.

An appeal having been taken to this Court by the respondents-appellants from an order of the Supreme Court, New York County (Richard Price, J.), entered on or about December 12, 1983, which granted the petition of petitioner-respondent to the extent of remanding the matter to respondents-appellants for a departmental hearing on the question of reinstatement,

And said appeal having been argued by Edward F.X. Hart of counsel for appellants, and by Raymond E. Kerno of counsel for petitioner-respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same hereby is reversed, on the law, the petitioner's motion to restore this proceeding to the calendar for a determination on the merits is denied, and the petition is dismissed, without costs and without disbursements.

Enter:

FRANCIS X. GALDI
Deputy Clerk.

Decision of the Appellate Division, First Department.

Kupferman, J. P., Ross, Asch, Fein, JJ.

23238

IN RE

CHARLES BRIGGINS,

Petitioner-Respondent,

For a Judgment, etc.,

against

ROBERT MCGUIRE, etc., *et al.*,

Respondents-Appellants.

R. E. Kerno

E. F. X. Hart

Order of Supreme Court, New York County (Richard Lee Price, J.), dated December 12, 1983 (no evidence of entry; leave to appeal granted by Price, J. in an order entered April 17, 1984), granting the petition to the extent of remanding this matter to respondents for a departmental hearing on the question of reinstatement, unanimously reversed on the law, the petitioner's motion to restore this

proceeding to the calendar for a determination on the merits is denied, and the petition is dismissed, without costs.

Petitioner joined the New York City Police Department in September 1966, and was later promoted to the rank of detective. In order to conceal additional earnings from outside employment, petitioner adopted a pseudonym under which he opened an independent bank account. He also obtained a temporary driver's permit and applied for a permanent driver's license under this false identity. In March 1975 this scheme came unraveled when a salesclerk at a Suffolk County store where petitioner was shopping queried petitioner on his identity for reasons unrelated hereto. Evidently concerned that his use of the pseudonym would be discovered, petitioner struggled with the security guard called to the scene, who happened to be an off-duty Suffolk County police officer. This scuffle resulted in petitioner's arrest, and the revelation of his true identity. A 13-count indictment charged petitioner with various counts of assault, forgery of checks signed in his pseudonym, larceny of the purchased merchandise, possession of several checks drawn to the order of the pseudonym, and two counts of criminal possession of a forged instrument in the second degree (the driver's permit and application for permanent license), a Class D felony. The trial court dismissed the check forgery counts and the jury acquitted petitioner of all other charges except for the two counts relating to possession of the allegedly forged driver's permit and application for permanent license. He was sentenced to 60 days on each count. After affirmance by a divided court (67 AD2d 1004), the conviction was ultimately reversed and the indictment dismissed in May 1980 (50 NY2d 302), the Court of Appeals ruling that the elements of criminal possession of a forged instrument

were not present, petitioner having signed his own pseudonym to these documents.

Petitioner thereafter applied for reinstatement to full duty with the New York City Police Department, or at least an opportunity to clear his name. When respondent denied this application, petitioner brought the instant Article 78 proceeding, seeking reinstatement or at the very least a hearing on the question. Respondents' appeal is solely from an interim order granting petitioner a departmental hearing on the issue.

Public Officers Law Sec. 30 subd. 1e provides that a public office shall be considered "vacant" upon the office-holder's "conviction of a felony, or a crime involving a violation of his oath of office." The language of this statute has remained virtually unchanged since enactment of the Public Officers Law nearly a century ago (L.1892, c.681, Sec. 20). Viewing the purpose of the statute as removal of a convicted felon from a position of public honor, rather than actual punishment for his offense, the Court of Appeals ruled more than sixty years ago that "[t]he application of the statute is not defeated by the possibility that the judgment may be reversed." (*Matter of Obergfell*, 239 NY 48.)

The Court of Appeals has more recently had occasion to re-examine this question in *Matter of Toro v. Malcolm* (44 NY2d 146, cert den 439 U.S. 837). There a correction officer's felony conviction was reversed on appeal and he was voluntarily reinstated to his office. The officer's petition for back pay was rejected by the Court of Appeals, which ruled that the Legislature had declared such offices to be vacant upon conviction of a felony, notwithstanding "the possibility that at some future date a former officer's conviction may be reversed" (44 NY2d at p. 150).

That there is a residual sense of harshness and unfairness in a rule that stigmatizes an individual even after his

conviction has been overturned cannot be denied. But we are dealing here with two sets of standards, applicable in disparate circumstances, which should not be confused. The first is the high standard that must be satisfied for serving in a position of public trust, symbolized by the oath of office (see NY Const, art XIII, Sec. 1; Public Officers Law Sec. 10).

The second is the unrelated standard of proof necessary to support a criminal conviction (i.e., beyond a reasonable doubt). Evidence in a particular case may be insufficient to prove a criminal allegation, and yet may still be sufficient to call into question a police officer's moral qualifications for continued public service. Continued occupation in a position of public trust may be thwarted by evidence of conduct which might still be insufficient to support a criminal conviction. As the Court of Appeals noted in *Toro,* a conviction may have resulted from indisputably conclusive evidence of guilt, with reversal warranted due solely to procedural irregularity. While the courts must be "sympathetic to the plight of a truly innocent officer unjustly accused and convicted," we must still be "opposed to establishing a general rule which would provide unjustified relief to others not equally deserving." (*Matter of Toro v. Malcolm, supra,* 44 NY2d at p. 151.) This is not to say that relief would not be available to the unjustly convicted innocent who was completely vindicated on appeal. Nothing prevents a *de novo* application for appointment, or even reinstatement. But the law prohibits automatic reinstatement in such circumstances. Reversal of a conviction and dismissal of an indictment may remove a disability to hold office, but it does not entitle one to automatic reinstatement (*Sroka v. Municipal Civil Service Commission,* 57 AD2d 1064). Discretion in such matters rightfully resides in the governmental agency in which the officer was employed (*Matter of Toro v.*

Malcolm, supra). That agency is charged with maintaining a balance between the rights of an officer who may or may not have been falsely accused of impropriety, and the right of the public to be assured that its officers meet high standards of moral integrity. As to the latter, a "felony conviction, notwithstanding its reversal on appeal, may in many cases shatter this ideal." (*Matter of Toro v. Malcolm, supra,* 44 NY2d at p. 152.)

Petitioner here complains that denial of reinstatement without a hearing deprives him of constitutional due process. We have already held that since a public office is automatically vacated by operation of law upon conviction, there would be no entitlement to a pre-discharge hearing (*Matter of Hodgson v. McGuire,* 75 AD2d 763). *A fortiori,* there is no entitlement to a post-termination hearing on an application for reinstatement. The office having been vacated long before the application for reinstatement, all rights to the office disappeared at that time. Denial of a hearing in conjunction with petitioner's application for reinstatement deprived him of neither liberty nor property, thus negating any claims with regard to constitutional due process (*Greene v. McGuire,* 683 F2d 32).

Order filed.

APPENDIX C—Memorandum Decision of the Supreme Court, New York County (Hon. Richard Lee Price, J.)

Supreme Court of the State of New York, Special Term Part I, New York County at the Courthouse thereof, 60 Centre Street, New York, New York 10007.

Present:
Hon. Richard Lee Price, Justice.

CHARLES BRIGGINS

against

ROBERT J. MCGUIRE

The following papers numbered 1 to 6 read on this motion submitted No. 75 on Calendar of October 31, 1983.

	Papers Numbered
Notice of Motion—Enumerated Papers #1-5 and Affidavits Annexed	1-5
Filed Papers—See Order, Justice Hedda G. Schwartz	6

Upon the foregoing papers this motion is decided in accordance with the accompanying memorandum decision.

Dated: 12-12-83

R. L. P.
J.S.C.

C3

SUPREME COURT

NEW YORK COUNTY

Special Term, Part I

IN THE MATTER OF THE APPLICATION

OF

CHARLES BRIGGINS,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

against

ROBERT J. MCGUIRE, as Police Commissioner of the Police Department of the City of New York, NEW YORK CITY POLICE DEPARTMENT and THE CITY OF NEW YORK,

Respondents.

Index No. 22319/81

PRICE, RICHARD LEE, J.:

In accordance with this court's decision of April 13, 1983, granting this Article 78 petition to the extent of

directing the respondent to file and serve an answer, petitioner now moves to have this action restored to the calendar and determined on the merits.

Respondent's earlier motion to dismiss was granted to the extent of holding that petitioner is not entitled to a court order of reinstatement. The issue before this court now, on the merits, is whether petitioner is entitled to a court-ordered *hearing* on the issue of reinstatement. For the reasons set forth in this court's decision of April 13th, as well as the reasons that follow, the petitioner is found entitled to a hearing in accordance with the mandate and procedures set forth in Civil Service Law 575.

In my April 13th decision I held that the recent second circuit reversal in *Green v. McGuire,* 683 F.2d 32 (1982), revs'g 517 F. Supp. 1330 (S.D.N.Y. 1981), does not compel this state court to find that a police officer whose felony conviction is reversed on the grounds that no crime has in fact been committed is not entitled to an otherwise statutorily required hearing. My conviction on this issue has not changed.

Although my decision has not changed, I am not without appreciation for respondent's position. Respondents maintain that (in addition to the automatic, permanent vacatur of state office resulting from a felony conviction) petitioner is not entitled to a departmental hearing for two strong reasons:

(1) the conduct underlying the petitioner's conviction, even if not criminal, was certainly suspicious and questionable, and

(2) charges and speculations pending against petitioner at the time of his conviction (based upon different and distinct alleged criminal acts) indicate petitioner's unworthiness as a police officer.

All the allegations and suspicions aimed at and regarding petitioner may be well-founded and petitioner may indeed be unworthy of the vaulted position of police officer. Nor does this court deny that respondents have carefully weighed petitioner's motion for reinstatement, (even to the point of allowing oral argument.) But respondents have weighed that motion within their own interpretation of the law as they see it, and unfortunately I believe that interpretation is incorrect.

Petitioner is entitled to a hearing with respect to both the acts underlying the conviction and the acts underlying the pending charges and specifications. The facts that the acts underlying the conviction were not considered a crime will not prevent the respondents from discharging the petitioner. It is a well-settled principle of law that police officers must live up to a level of behavior and morality that the rest of society is not held to. See *Perry v. Blair,* 64 App. Div. 2d 870, 407 N.Y.S.2d 371 (4th Dept. 1978).

Similarly, there is nothing to prevent respondents from discharging petitioner if the acts underlying the charges and specifications are substantiated as having occurred. But this court will not permit respondents to bolster their claim of permanent forfeiture with allegations of other, unproven misdeeds. It is to prevent this very type of administrative action that Civil Service Law §75 (as well as due process requirements in general) was created. A mere "review of [petitioner's] service record" is insufficient as a matter of law.

So stated, this court holds that where a permanent civil service employee is discharged by operation of Pub. Off. Law §30(e) as the result of a felony conviction, but that conviction is reversed on the basis that no crime was in fact committed, the employee is entitled as a matter of law to a post-termination hearing in accordance with CSL §75 to determine if the employee should be reinstated. The

standards to be utilized in this determination are the same as those that are used to determine if an employee should be discharged in the first place.

Petition granted to the extent of remanding the matter to the respondents for hearing and determination in accordance with this decision.

Settle judgment.

Dated: December 12, 1983

RICHARD LEE PRICE
J.S.C.

Supreme Court, U.S.
FILED
OCT 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-163

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHARLES BRIGGINS,

Petitioner,

-against-

THE POLICE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 566-4338 or 4339

LEONARD KOERNER,*
LARRY A. SONNENSHEIN,
EDWARD F.X. HART,
of Counsel.

October 3, 1986

*Attorney of Record

QUESTIONS PRESENTED

1. Whether a police officer, dismissed pursuant to Public Officers Law, §30, upon his conviction of a felony, is entitled to a reinstatement hearing if the felony conviction is overturned on appeal?

2. Whether a police officer has been afforded due process sufficient to terminate his property interest in his public employment where his employment is terminated after a jury has found him guilty of a felony in a criminal trial?

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No. 86-163

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHARLES BRIGGINS,

Petitioner,

-against-

THE POLICE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

STATEMENT OF THE CASE

Petitioner seeks to have this Court review by writ of certiorari an order of the New York State Court of Appeals, entered on May 6, 1986, which affirmed an order of the New York Supreme Court, Appellate Division, First Department, entered August

8, 1985. That order reversed a judgment of the New York Supreme Court, New York County, entered December 12, 1983, which granted a petition, brought pursuant to CPLR Article 78 to the extent that it ordered a hearing on the question of petitioner's reinstatement as a police officer. Petitioner argued, inter alia, that Public Officers Law, §30, which requires a vacatur of office upon its holder's conviction of a felony, is unconstitutional as applied to petitioner since his conviction was reversed on appeal.

Respondents rely on the facts presented in the Petition for a Writ of Certiorari and in the opinion of the Court of Appeals (Briggins v. McGuire, 67 NY2d 965, 494 NE2d 90, 502 NYS2d 985 [1986]) with the following additions. Petitioner's application for reinstatement upon reversal of conviction was reviewed by the Police Department and an extensive report, based mainly upon

testimony at petitioner's criminal trial, was submitted by the Advocate's Office of the Police Department to the Commissioner for his consideration. Based upon his findings, the Advocate's Office recommended against reinstatement and the Commissioner acted in accordance with this recommendation.

Among other findings based upon testimony at the criminal trial, the following are most significant:

> "Mr. William Windsor's apartment in the 1st Precinct in New York City was burglarized on September 2nd 1974. Among the items missing was his check book containing checks numbered from approximately 126 to 150. These checks, along with some other stolen property, were recovered by the 1st Precinct Detective Unit on September 3rd 1974. This is the same Detective Unit to which the applicant was assigned. When Briggins was arrested on March 1, 1975, 6 months later, he was in possession of several of these checks, specifically numbers 137, 138, 143 and 144 which were made payable to the order of Garry Morris and signed either W. Windsor or William Windsor. These

checks had the amounts printed on them by means of a check writing machine.

He was also in possession of William Windsor checks numbered 139, 140 and 141 which were not payable to anyone's order, but did have amounts preprinted on these checks by means of a check writing machine. All of the checks were stamped by one of two check writing machines, or one machine with interchangeable stamping plates. One stamp reads 'BONDED 8D51249' the other reads 'INSURED 87083146.'

Briggins' explanation regarding his possession of these checks is that he found them by the curb in the vicinity of the 1st Precinct where he worked in 1975.

He claims they were blank when he found them; that he just tossed them into the trunk of his car and forgot about them; and that he found them only about three weeks prior to his arrest or approximately February 7, 1975. This is five and a half months after being recovered by the New York Police Department. Mr. Briggins implied throughout his criminal trial and in his legal memorandum that the Suffolk County Police 'framed' him by writing his assumed name, 'Garry Morris', on the blank Windsor checks.

> However, another check from this same book surfaced. Check #132 made payable to the order of 'Samuel Butter' or 'Samuel Butler.' This check also had the amount stamped on it by a check writing machine bearing the same INSURED #87083146. The date on this check is January 14, 1975, a month and a half prior to Briggins arrest by Suffolk County Police, thereby eliminating any likelihood of fabrication by the police. This check was cashed at a Waldbaum's Super Market, store, #31, in Carle Place approximately 8 miles from Briggins hometown of Freeport.
>
> The manager of Waldbaums, Mr. Vincent Margo, testified at the criminal trial that he authorized the cashing of check #132; and he identified Charles Briggins as Samuel Butler. Check #132 was dishonored because of insufficient funds on January 17, 1975, resubmitted, and again dishonored on January 20, 1975."

Based upon this information culled from petitioner's criminal trial, the Advocate's Office recommended that petitioner not be afforded a hearing and that his application be denied.

Reasons for Denying a Writ of Certiorari

ARGUMENT

UPON HIS CONVICTION OF A FELONY, REGARDLESS OF ANY SUBSEQUENT REVERSAL, PETITIONER'S PUBLIC OFFICE WAS AUTOMATICALLY VACATED BY OPERATION OF STATE LAW AND HE CEASED TO POSSESS A PROPERTY INTEREST COGNIZABLE UNDER THE FOURTEENTH AMENDMENT. PETITIONER'S CRIMINAL TRIAL AFFORDED HIM ALL THE DUE PROCESS TO WHICH HE IS REASONABLY ENTITLED PRIOR TO DEPRIVATION OF HIS PROPERTY INTEREST. THE FACT THAT PETITIONER'S CONVICTION WAS LATER REVERSED DOES NOT REVIVE HIS PROPERTY INTEREST, ONCE VALIDLY EXTINGUISHED.

(1)

In order to establish a property interest sufficient to warrant due process protection, petitioner must demonstrate a legitimate claim of entitlement to continued tenure or reinstatement which arises from state law or from existing rules or mutual understandings steming from the law.

Bishop v. Wood, 426 US 341, 343-347 (1976); Board of Regents v. Roth, 408 US 564, 577 (1972); Perry v. Sindermann, 408 US 593, 601 (1972); Greene v. McGuire, 683 F2d 32 (2nd Cir., 1983); Baden v. Koch, 638 F2d 486, 489 (2nd Cir., 1980); Quinn v. Syracuse Model Neighborhood Corp., 613 F2d 438, 447 (2nd Cir., 1980). Since a public officer holds office subject to the terms and conditions imposed by the statute creating and regulating his office (Gordon v. Leatherman, 450 F2d 562, 565 [5th Cir., 1971]), an examination of the law of New York State with respect to the right of a police officer to retain his position following his felony conviction must be made in order to determine whether plaintiffs possess a property interest protected by the Fourteenth Amendment.

The Administrative Code of the City of New York, §434a-14.0, provides that the

Police Commissioner shall have the power to remove for misconduct, upon written charges and a hearing, officers who have completed a probationary period. However, that section must be read in connection with Public Officers Law, §30, which is entitled "Creation of vacancies" and which provides for vacatur of public office upon the happening of certain specified events. Specifically, subdivision 1(e) of §30 states that a public office shall be vacant upon the incumbent's:

> conviction of a felony, or a crime involving a violation of his oath of office."

Police Officers have been held to be public officers for the purposes of the Public Officers Law. Canteline v. McClellan, 282 NY 166, 170, 25 NE2d 972 (1940); Matter of Hodgson v. McGuire, 75 AD2d 763, 427 NYS2d 820 (1st Dept., 1980); Fishbein

v. State, 282 App. Div. 600, 125 NYS2d 845 (3rd Dept., 1953).

The New York courts have construed section 30 as operating to vacate an office simultaneously and automatically upon the conviction of the incumbent. No hearing need be held or other action taken as a prerequisite to vacatur. Matter of Hodgson v. McGuire, supra; Matter of Smith v. Noeppel, 204 Misc 49, 50-52, 120 NYS2d 466 (Sup. Ct. Erie Co., 1953). Public Officers Law, §30, was not intended as punishment for wrongful conduct. Rather, it is simply an automatic limitation on an incumbent's term of office. Matter of Toro v. Malcolm, 44 NY2d 146, 149-150, 375 NE2d 739, 404 NYS2d 558 (1978), cert. den., 439 US 837 (1978); Matter of Obergfell, supra, 239 NY 48, 145 NE 323 (1924); Sroka v. Municipal Civil Service Commission of the City of

Buffalo, 57 AD2d 1064, 395 NYS2d 854 (4th Dept., 1977).

The State courts have considered whether the operation of section 30 is affected by the pendancy of an appeal from a conviction or its subsequent reversal. In Matter of Obergfell, supra, the Court of Appeals held that vacatur of office upon conviction of a felony was not defeated by the possibility that the conviction may be reversed on appeal. Subsequently, in 1953, the State Supreme Court was called upon to decide whether the reversal of a conviction upon appeal entitled the officer to reinstatement. In Smith v. Noeppel, supra, 204 Misc 49, a police officer's conviction for bribery, conspiracy and the taking of unlawful fees was reversed by the Appellate Division and the indictment dismissed. The Court denied the officer's petition for reinstatement, holding that the order of the

Appellate Division cleared the individual of the accusation but did not defeat the application of section 30. The Court noted that a public office should not remain vacant during any period when the former occupant "winds his way through the labyrinth of motions, appeals, new trials and possibly more motions and more appeals." 204 Misc at 52. See also, Matter of Pauley v. Noeppel, 1 Misc 2d 928, 120 NYS2d 472 (Sup. Ct. Erie Co., 1953); Matter of Tourjie v. Noeppel, 120 NYS2d 478 (Sup. Ct. Erie Co., 1953).

In Sroka v. Municipal Civil Service Commission, supra, 57 AD2d 1064, the Appellate Division, Third Department, held that the reversal of a conviction of a police officer and the consequent dismissal of his indictment did not entitle him to reinstatement.

This issue was considered by the Court of Appeals in 1978 in Matter of Toro v.

Malcolm, supra, 44 NY2d 146. The Court noted that the continued efficient performance of government functions requires that an office be filled upon the conviction of its incumbent without concern for the possibility that at some future date the former incumbent's conviction may be reversed. 44 NY2d at 150. It stated that the reversal of a conviction is often not indicative of innocence but may be the result of a technicality or prosecutorial error which results in a guilty person going unpunished. Moreover, the Court observed that the balance between an officer unjustly convicted of a felony and the public's right to place confidence and trust in public officers must be struck in favor of the public. The Court concluded that reinstatement following reversal of a conviction rests solely in the discretion of the government agency in which the officer was employed. 44 NY2d at 152.

The Court reaffirmed this decision in Matter of Gunning v. Codd, 49 NY2d 495, 499, 403 NE2d 1208, 427 NYS2d 209 (1980), and in the instant case.

This analysis of Public Officers Law, §30, and the cases construing it clearly and conclusively demonstrates that petitioner has no right under New York law to reinstatement following the reversal of his conviction or a hearing on the question of reinstatement. Moreover, petitioner does not allege that it is Police Department policy to reinstate a former officer whose conviction has been reversed on appeal. Thus, a police officer assumes his position on condition and with the understanding that he will be automatically dismissed from the force without a hearing if he is convicted of a felony or other crime involving a violation of his oath of office and will not be entitled to reinstatement if his conviction is

subsequently reversed on appeal. The Court of Appeals has specifically held that the property interest of an officer to continued tenure is extinguished upon his conviction of a felony. Economico v. Village of Pelham, 50 NY2d 120, 126, 405 NE2d 694, 428 NYS2d 213 (1980).

Since plaintiffs have failed to demonstrate a legitimate claim of entitlement under state law or any rule or mutual understanding providing for reinstatement, they possess no property right which would entitle them to a hearing on that question.

(2)

The United States Court of Appeals for the Second Circuit has addressed the issue of Fourteenth Amendment due process rights in regard to Public Officers Law, §30, in Greene v. McGuire, supra, 683 F2d 32. There, as here, the plaintiffs, former police officers, sought a hearing on their

applications for reinstatement. The officers' convictions had been reversed for insufficient evidence. 683 F2d at 33, 36. The Court held that no hearing was required and that the statute worked no deprivation of either property or liberty interests protected by the Fourteenth Amendment. Addressing the claim of a right to a hearing based on an alleged property interest, the same claim made at bar, the Court stated (683 F2d at 35):

> "Once they were convicted ... they lost their property interest.
>
> * * *
>
> The statute and its interpretations are plain: the plaintiffs' jobs are no more. When plaintiffs applied for reinstatement, they had neither the right to return nor any reasonable expectation of being rehired. Because state law left them nothing, Commissioner McGuire's decision deprived them of nothing. His decision did not implicate due process."

Petitioner is not entitled to procedural due process which guarantees that, in every case, the result will be absolutely correct. No system is foolproof. He is entitled to a procedure reasonably calculated to assure that his rights are protected. Clearly, a criminal trial with its full panoply of procedural and substantive protections is more than sufficient to afford petitioner the minimal due process rights required under the Constitution before he is deprived of a property interest.

Public Officers Law, §30, serves the dual purpose of ridding government service of convicted felons and of insuring the efficient functioning of government by permitting government to fill vacant offices rather than keeping them open until completion of the entire lengthy criminal appeal process. See, Matter of Toro v.

Malcolm, supra, 44 NY2d 146; Matter of Obergfell, supra, 239 NY 48.

Since petitioner has been afforded significant due process prior to his termination by operation of section 30 and since the statute serves to further important government interests, petitioner has suffered no deprivation of his due process rights.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

October 3, 1986

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the
City of New York,
Attorney for the Respondents.

LEONARD KOERNER,
LARRY A. SONNENSHEIN,
EDWARD F.X. HART,
of Counsel.

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No. 86-163

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES BRIGGINS,

Petitioner,

- against -

THE POLICE DEPARTMENT OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

BRIEF OF THE NEW YORK STATE PUBLIC EMPLOYEES FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RICHARD E. CASAGRANDE
PUBLIC EMPLOYEES FEDERATION
159 WOLF ROAD
ALBANY, NEW YORK 12205-1189
(518) 459-5412

Attorney for Amicus Curiae

LISA J. SEEMANN
Law Clerk on the Brief

August, 1986

QUESTION PRESENTED

Whether the New York State Public Officers Law §30(1)(e), which provides that a public office becomes "vacant" upon the felony conviction of the office holder, is unconstitutional as applied to petitioner, who has been terminated from his public employment because of a felony conviction, despite the fact that the conviction was reversed on appeal on the ground that the evidence against him established that his conduct did not constitute a crime.

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BRIEF OF THE NEW YORK STATE PUBLIC EMPLOYEES FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The attorneys for both parties have consented to the filing of this brief by the New York State Public Employees Federation.

The New York State Public Employees Federation (hereafter "PEF") is the certified bargaining agent for the Professional, Scientific and Technical Services Unit of New York State employees. PEF represents approximately 50,000 state employees. The vast majority of these employees are "tenured." That is, they are civil servants who, by the successful completion of a probationary period, have obtained a legal right not to be terminated from public employment except for cause.

Although most of PEF's members are not public "officers," this case still has profound implications for the due process rights of all public employees. The New York State Court of Appeals has ruled that a public officer who has obtained a property interest in his employment may forfeit that interest, based solely on his conviction of a crime, even if the conviction is reversed on substantive grounds. This decision by New York's highest court means that a person may lose a substantial property interest even if an impartial decision maker has found him guilty of nothing. The case thus addresses the means by which a state can deprive any public employee of the property interest he has in his continued employment under the Fourteenth Amendment's Due Process Clause.

In cases such as *Cleveland Board of Education v. Loudermill*, 470 U.S. __, 84 L.Ed.2d 494 (1985), this Court has recognized this to be an important issue and has significantly developed this area of the law. Yet, as evidenced by the two dissents from the decision of the New York State Court of Appeals, there is still much confusion about this issue.

PEF presents this brief as *amicus curiae* in support of the petition for writ of certiorari. PEF's brief examines the judicial precedents concerning the due process rights of public employees and demonstrates the importance of this case. PEF believes its brief will be of assistance to the Court in considering the petition.

SUMMARY OF ARGUMENT

I.

Petitioner had a property interest in his public employment position as a New York State Police Officer. This property interest is protected by the Due Process Clause of the Fourteenth Amendment.

II.

It is well settled that the Constitution, and not state law, determines the procedures which satisfy due process requirements. Therefore, when the State sought to extinguish petitioner's property interest in his employment, petitioner was entitled to due process.

III.

Petitioner was convicted of a felony and lost his position by automatic operation of New York Public Officers Law §30(1)(e). The conviction was subsequently reversed because petitioner was found innocent of any criminal wrongdoing. Petitioner did not, however, regain his position and was not afforded a reinstatement hearing.

This procedure does not comply with due process. Due process requires that any deprivation of life, liberty, or property be preceded by notice and a meaningful opportunity to be heard. Petitioner, however, was not given an opportunity to be heard on the only issue which remained after the reversal of the criminal conviction, which was whether any of petitioner's conduct might possibly justify discharging him from his position.

IV.

In light of these arguments, it is clear that New York Public Officers Law §30(1)(e), as it was applied to petitioner, is unconstitutional. Review by this Court is crucial: States must not be allowed to arbitrarily eliminate due process protection of important property rights. Therefore, the *amicus* respectfully requests that the Court grant the petition for writ of certiorari.

ARGUMENT

I. PETITIONER HAD A PROPERTY INTEREST IN HIS CONTINUED EMPLOYMENT.

In order to establish a case, petitioner must show that the statutory scheme at issue impacts upon a liberty or property interest protected by the Fourteenth Amendment's guarantee of procedural due process. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Whether there is a property interest in public employment is determined solely by reference to state law. *Bishop v. Wood*, 426 U.S. 341, 345 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth, supra*, at 561.

In the present case, it is undisputed that petitioner had a protected property interest in his employment under New York State's Civil Service Law. *Briggins v. McGuire*, 67 N.Y.2d 965, 502 N.Y.S.2d 985 (1986); New York Civil Service Law, §§58, 63, 75.

II. SINCE THE PETITIONER HAD A PROPERTY INTEREST IN HIS EMPLOYMENT, HE WAS ENTITLED TO DUE PROCESS WHEN THE STATE SOUGHT TO EXTINGUISH THAT INTEREST.

It is now well-settled that once a public employee has obtained a property interest in his continued employment, the deprivation of that interest must meet the standards of constitutional due process even if the state law which creates the property interest provides a lesser standard of procedural protection. *Cleveland Board of Education v. Loudermill*, 470 U.S. __, 84 L.Ed.2d 494, 503 (1985); *Vitek v. Jones*, 445 U.S. 480, 491 (1980); *Logan v. Zimmerman Brush Co.*, 445 U.S. 422, 432 (1982).

The view that a litigant could not challenge the constitutionality of a statute under which rights had been simultaneously claimed, but

had to take "the bitter with the sweet," had been professed by the plurality opinion in *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974). This view has since been specifically rejected. In *Cleveland Board of Education v. Loudermill, supra*, the Court stated:

> [I]t is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee . . . "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred not by legislative grace, but by constitutional guarantee." Arnett v. Kennedy, supra, at 167, 40 L.Ed.2d 15, 94 S.Ct. 1633 [Id., at 470 U.S. __, 84 L.Ed.2d 503.]

Since the petitioner had acquired a property interest in his employment, the main issue in this case is whether the State complied with due process when it deprived him of that employment.

III. THE OPERATION OF NEW YORK PUBLIC OFFICERS LAW §30(1)(e) AS IT APPLIED TO PETITIONER FAILED TO SATISFY THE REQUIREMENTS OF THE DUE PROCESS CLAUSE.

New York Public Officers Law §30(1)(e) provides that a public office is automatically vacated upon an officer's conviction of a felony or of a crime involving a violation of his oath of office. It reads:

> §30. Creation of Vacancies
>
> 1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:
>
> * * *
>
> e. His conviction of a felony or a crime involving a violation of his oath of office . . . .

The statute recognizes no entitlement to reinstatement or to a hearing after the position has been vacated due to a conviction, even upon reversal of that conviction.

In this case, the New York Court of Appeals' interpretation of POL §30(1)(e) has effectively deprived the petitioner of his public employment without due process. When petitioner was convicted of a felony, his position was automatically vacated by operation of law. When petitioner's conviction was subsequently reversed and his indictment dismissed because petitioner was found to be not guilty of any criminal conduct, the court held that the reversal was irrelevant and that petitioner was not entitled to a reinstatement hearing. *Briggins v. McGuire*, 67 N.Y.2d 965, 502 N.Y.S.2d 985 (1986). It found that the denial of a reinstatement hearing did not raise due process questions because the statute had already extinguished the property interest, and thus there was no property interest to be taken. *Id.*, 502 N.Y.S.2d at 986.

The *Briggins* court relied on two cases in which public employees were deprived of their positions by the operation of POL §30(1)(e). The courts in those cases held that the statute, by vacating the employees' positions, had taken away the employees' property interests. Therefore, since state law left them with nothing, the decision not to provide reinstatement hearings deprived them of nothing. *Greene v. McGuire*, 683 F.2d 32 (1982); *Toro v. Malcolm*, 44 N.Y.2d 146, 375 N.E.2d 739, 404 N.Y.S.2d 558 (1978). The *Briggins* court also cited *Bishop v. Wood, supra*, as "the most relevant [Supreme Court] authority." It concluded that it lacked the authority to order the reinstatement of a former officer in petitioner's position. *Briggins v. McGuire, supra*, 502 N.Y.S.2d at 986.

This analysis is incorrect. The court has failed to ask the question which the Constitution requires and which clearly becomes the specific issue in this case: *Did the deprivation of petitioner's property interest through the operation of POL §30(1)(e) satisfy the requirements of the Due Process Clause?* Instead, the court effectively allowed petitioner's property interest to be defined, and extinguished, by the procedures set forth in the statute, without regard to whether those procedures gave the petitioner notice and an opportunity to be heard in a meaningful way. This, of course, is exactly what this Court rejected in *Loudermill*.

This Court has held that "[a]n essential principle of due process is

that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' " *Loudermill, supra,* 470 U.S. at __, 84 L.Ed.2d at 503, *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). New York's POL §30(1)(e) as applied in this case fails to meet this standard.

POL §30(1)(e) bases the forfeiture of public office on a felony conviction. In most cases this procedure would satisfy the requirements of due process. A criminal trial provides the accused with both notice and an opportunity to be heard regarding the charges against him. Moreover, since a felony conviction clearly taints the fitness of a police officer, the State is unquestionably justified in terminating the employment of such an officer. Such a result is rational, and the process accorded the accused is certainly adequate to meet any due process test.

In this case, however, petitioner's conviction was reversed and the criminal indictment dismissed. *People v. Briggins*, 50 N.Y.2d 302, 406 N.E.2d 766, 428 N.Y.S.2d (1980). The New York Court of Appeals found petitioner to be innocent of any criminal wrongdoing. "Applying 'the fundamental principle that a person cannot be found criminally liable for conduct which *does not constitute a crime*' (*People v. Briggins*, 50 N.Y.2d 302, 309, 428 N.Y.S.2d 909, 406 N.E.2d 766 [emphasis added]), we reversed the Appellate Division's order affirming Briggins' conviction and dismissed the indictment." *Briggins v. McGuire, supra,* Hancock, J., dissenting, 502 N.Y.S.2d at 986-87.

Once petitioner's conviction was reversed, the result of the statute's operation became irrational. A public officer not convicted of any crime has irrevocably lost his employment because of an earlier, erroneous conviction. The result of the procedural due process accorded to the employee, a criminal trial, has been ignored. The State has relied on the criminal procedure, but has only selected one isolated part of an integrated system. The State has borrowed the result of a hearing which was ultimately ruled by the Court of Appeals to be incorrect.

As noted in the dissent to the denial of a reinstatement hearing,

common sense and fairness dictate that such a result is clearly wrong. *Briggins v. McGuire, supra,* Hancock, J., dissenting, 502 N.Y.S.2d at 987. The reason it is wrong goes back to the basic proposition that due process requires that the procedures which attend any loss of liberty or property be *meaningful.* In this case, it can hardly be said that the procedures accorded the petitioner were meaningful. Those procedures led to his acquittal, but he was nonetheless deprived of his property.

Once the petitioner had been acquitted of any criminal conduct, the *only* remaining issue was whether he was guilty of any wrongdoing which might possibly be grounds for his dismissal. This potential non-criminal wrongdoing, however, was not an issue at the criminal trial. Therefore, there has been no hearing with regard to this issue. Again, due process procedures must be tailored "to insure that [those deprived of property] are given a *meaningful* opportunity to present their case." *Mathews v. Eldridge, supra,* 424 U.S. 319, 349 (emphasis added). The only meaningful hearing in this case would be one addressing the non-criminal conduct: at this point only a reinstatement hearing can provide due process.

The issue then becomes the feasibility and value of a reinstatement hearing. *Mathews v. Eldridge, supra,* sets forth the factors to be considered in striking the appropriate due process balance. They are: (1) the degree of potential deprivation that may be created by a particular decision; (2) the fairness and reliability of the existing pretermination procedures and the probable value, if any, of additional procedural safeguards to prevent mistakes; and (3) the public interest, including the administrative burden and other societal costs of providing a hearing, such as increased cost to the employer, and the governmental interest in preserving scarce fiscal resources. *Mathews v. Eldridge, supra,* 424 U.S. 319, 347-48.

As applied to petitioner, this balancing test clearly tips in favor of a reinstatement hearing, in much the same way as it did in *Cleveland Board of Education v. Loudermill, supra.*

First, the potential deprivation to petitioner (loss of his employment) is of severe proportions. As noted in the *Loudermill* concurrence:

> The substitution of a meager welfare grant for a regular paycheck may bring with it painful and irremediable personal as well as financial dislocations. A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may be irrevocably affected. The costs of being forced, even temporarily, onto the welfare rolls because of a wrongful discharge from tenured Government employment cannot be so easily discounted. *Id.* at 221, 40 L.Ed.2d 15, 94 S.Ct. 1633. [*Cleveland Board of Education v. Loudermill, supra*, Marshall, J., concurring, 84 L.Ed.2d at 509.]

Second, as demonstrated, the reliability and fairness of the procedure under POL §30(1)(e), as applied to petitioner, is suspect at best. It is certainly rational for the State to use the result of a criminal trial, in which the accused is given stringent procedural protections, to determine a public officer's fitness. It seems fundamental, however, that if the final result of the criminal process is an acquittal, then the law must provide some mechanism to determine whether the loss of a property interest because of the initial conviction is nonetheless appropriate. The probative value of a reinstatement hearing is obvious. As noted, petitioner has not had a hearing on the only possible remaining issue, which is his potential non-criminal wrongdoing.

This result might be different if the State, under POL §30(1)(e), sought only to use undisturbed factual findings made in the initial criminal case, for their collateral estoppel effect, to determine whether there was misconduct egregious enough to warrant petitioner's dismissal from his employment. The result also might be changed if the conviction, like those in *Greene* and *Toro, supra*, had been reversed on procedural or evidentiary grounds, leaving undisturbed the fact that a criminal trial had produced a finding of felonious conduct. In *Briggins*, however, the State has used the mere fact of conviction, despite the subsequent acquittal, to extinguish a valuable property right.

Third, the administrative burden of supplying a reinstatement hearing is slight, and is clearly justified by the competing interests of the petitioner and the public. As found in *Loudermill*, a due process

hearing for a public employee causes neither significant administrative burden nor intolerable delay. *Cleveland Board of Education v. Loudermill, supra*, 470 U.S. __, 84 L.Ed.2d 494, 505. The employer may be slightly inconvenienced, but "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647 (1974).

Moreover, the interests of the public tip the balance in favor of a reinstatement hearing. Even if the State could demonstrate a reasonable interest in the operation of POL §30(1)(e) as it applied to petitioner, this would be far outweighed by the public interest in ensuring that a person who has been wrongfully convicted and punished be made whole.[1]

The State stresses two interests to justify the potentially unfair application of POL §30(1)(e). One is that the public has a right to rest assured that its police officers are of high moral integrity. *Greene v. McGuire, supra*, 683 N.Y.S.2d at 34. While this is a worthy objective, petitioner has not been afforded a due process hearing on the issue of his moral integrity. Therefore, there is no basis upon which the State may conclude that petitioner does not have the integrity to continue in his position. Section 30(1)(e) of the Public Officers Law itself recognizes that even those convicted of misdemeanors not related to their office need not automatically forfeit public office. It is surely irrational for the same law to require the forfeiture of office of one accused and acquitted. Thus, POL §30(1)(e), as applied in this case, does not in any way promote the

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[1] The New York Criminal Procedure Law recognizes this concept, and has established a procedure which corrects injustice and remedies defects. When a judgment has been rendered which is against the weight of the evidence and the law, the CPL mandates that a new trial be granted in the interests of justice. *People v. Stein*, 15 A.D.2d 261, 226 N.Y.S.2d 525 (2nd Dept., 1962); *see also*, New York Criminal Procedure Law §470.20.

In addition, the CPL requires that action must be taken which is "necessary and appropriate . . . to rectify any injustice to the appellant resulting from the error or defect which is the subject of the reversal . . . ." New York CPL. §470.20.

first interest claimed by the State. This was noted by the dissent to this case, which said, "Nor is such a harsh application of the statute necessary to further its purpose . . . Its purpose is equally free from doubt — not to punish the officeholder . . ." but rather to assure that the public can trust such public officeholders. *Briggins v. McGuire, supra*, Hancock, J., dissenting, 502 N.Y.S.2d at 987.

The State also claims that in order for governmental functions to continue, there must be a time when the vacated position can be filled without concern for the possibility that a reversal of the conviction may occur at some later date. *Briggins v. McGuire, supra*, at 986, *citing Toro v. Malcolm, supra*. This argument is equally tenuous.

That administrative procedures can take time to reach proper results has never been an excuse for allowing the innocent to be punished. If the State relies on the criminal procedure, then it should accept the time that procedure takes to reach a final judgment.[2] "The Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois, supra*, 394 U.S. 645, 656; *Cleveland Board of Education v. LaFleur, supra*, 414 U.S. 632, 647. Thus, the balancing test of competing interests clearly demonstrates that factors which favor a reinstatement hearing are of such magnitude that they far outweigh any interests to the contrary.

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[2] In fact, the State already has a procedure which is designed for exactly this type of situation. The regulations to the New York Civil Service Law provide for "contingent permanent" appointments. Such appointments may be used, for example, where an employee leaves his job to run for public office, but plans to return to that position. 4 NYCRR §4.11. The new appointee is given the position "permanently," contingent on the former officeholder not returning.

Alternatively, the State, knowing that petitioner was appealing his conviction, could have suspended him and given notice to the person hired to fill petitioner's position that it was a potentially temporary job.

In the present case, the court expressed sympathy with the "plight of the truly innocent officer unjustly accused and convicted." The court noted, however, that it was simply enforcing legislative intent. *Briggins v. McGuire, supra*, 502 N.Y.S.2d at 986. Additionally, it cited the fact that the Legislature has not seen fit to remedy this unfortunate result. *Id.*

This is a statement which this Court should not endorse. Surely the Due Process Clause, if it means anything, means that the law should not leave persons wrongfully deprived of liberty or property with only an apology. The very reason for due process is to prevent the State from punishing absent a reasoned finding of culpable conduct. *See, Robinson v. California*, 370 U.S. 660 (1962) (State law making it a crime to be a drug addict unconstitutional under Eighth and Fourteenth Amendments); *Taylor v. Louisiana*, 370 U.S. 154 (1962) (State cannot impose criminal punishment absent evidence of guilt); *Thompson v. Louisville*, 362 U.S. 199 (1960) (it is a denial of due process to fine a man $10.00 absent any evidence of his guilt).

Finally, it is irrelevant that the New York Legislature has not corrected an obviously unjust law. As this Court clearly ruled in *Loudermill*, it is the Constitution, not legislative grace, which defines due process. The innocent victim need not take the bitter with the sweet:

> That these disruptions might fall upon a justifiably discharged employee is unfortunate; that they *might fall upon a wrongfully discharged employee is simply unacceptable.* [*Loudermill, supra*, 470 U.S. __, 84 L.Ed.2d 494, 509, Marshall, J., concurring.] [emphasis added]

CONCLUSION

In sum, the State's argument that due process was not implicated when petitioner was denied a reinstatement hearing is misplaced. Because POL §30(1)(e) does not provide for a hearing in the event of a reversal of conviction upon a finding of no criminal conduct, the statute denies due process. It is respectfully submitted that in such a case, a public employee has a constitutional due process right to a reinstatement hearing.

Accordingly, PEF submits that the challenged statute, as applied to petitioner, is unconstitutional.

This case reaches far beyond the issue of one public employee who has been discharged without a hearing. It is a fundamental principle of justice that punishment without a showing of wrongdoing is unfair, needless and unacceptable. When a state violates this principle, it does so in clear disregard of the Due Process Clause.

For this reason, PEF respectfully urges that this Court grant the petition for Writ of Certiorari.

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Respectfully submitted,

RICHARD E. CASAGRANDE
Public Employees Federation
159 Wolf Road
Albany, New York 12205-1189
(518) 459-5412

Attorney for the Amicus Curiae

Lisa J. Seemann
Law Clerk on the Brief